No. 13,118

IN THE

United States Court of Appeals

For the Ninth Circuit

CECIL LEE DAVIDSON, also known as Jack Reynolds,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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FOREWORD.

This reply brief adheres to the main subdivision headings under which the arguments were presented in the opening brief.

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1. THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

It affirmatively appears from the record that appellant Reynolds had no contact with Church earlier than March 23 or 24, 1951. RT 42-43. In attempting to connect appellant Reynolds with the general conspiracy alleged in the indictment as continuing from

January 27, 1951, to April 12, 1951, the appellee therefore found it necessary to rely upon testimony given by Davis.

It is undisputed that Davis was absent from the Davis automobile agency in Oakland when the automobile episode of January 27, 1951, accurred, and that whatever information he may have had respecting the occurrence was derived from Church. He immediately communicated with his attorneys and discussed the episode. RT 280-283. And according to his testimony they had previously advised him that arrangements had been made with the Director of Prisons, Washington, for his incarceration in the jail at San Bruno if he had to serve time. RT 265-269.

Davis first talked with appellant Reynolds respecting his case some time in February of 1951. This was before the Supreme Court had denied his petition for certiorari. It is certain on the present record that when that conversation occurred Davis had not joined any conspiracy, if one existed. And it is equally certain on the present record that neither the automobile episode nor the arrangement for place of incarceration was mentioned by Davis to appellant Reynolds at that conversation or at any other time or place. The conversation, as Davis has it, consisted in appellant saying he had a "deal" for Davis whereby for the payment of $200 at the end of each month Davis could be placed in Fairfield, treated well, and possibly allowed a telephone, guests, and cooking, and Davis saying he would "go along with the deal". RT 238-239.

The state of the evidence therefore refutes a contention that in February of 1951 appellant Reynolds joined an existing conspiracy. And even if it be assumed, which appellant denies, that the "deal" reflected a conspiracy for an unlawful purpose, the applicable law here is that stated in *United States v. Andolschek,* 2 Cir. 1944, 142 F. 2d 503, at page 507:

> "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may have entered, with third persons. That is of course an error; the scope of the agreement actually made measured the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. It is true that a party to a conspiracy need not know the identity, or even the number of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purpose as he understands them. Nevertheless he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others may do in execution of them. Upon the new trial if it shall appear that Hershowitz in fact supposed that there was only a limited plan or scheme, and that it did not include inspectors of the 'Permissive Section', he will not be proved to have been party to the conspiracy laid in the indictment, and there will therefore be a variance."

And in *Canella v. United States,* 9 Cir. 1946, 157 F.2d 470, this court said, at page 476:

"The theory of the trial court here and of the trial court in the Kotteakos case, was that all the evidence relating to all the separate spokes in the wheel was admissible against McCormac and Wyckoff and was relevant to the charge of a single conspiracy because of the general rule that when one joins an existing conspiracy he 'takes it over as it is' and becomes liable for all that has gone before or may come later. However ,'to bring that rule into operation it is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with other persons, even though they may be of the same general nature. The acts and declarations of confederates, past or future, are never competent against a party except in so far as they are steps in furtherance of a purpose common to him and them. Declarations . . . become competent only when they are uttered in order to accomplish the common purpose.' "

The record before the court makes it clear, however, that the "deal", as Davis relates it, was not an unlawful one. He was convicted in Sacramento, the Director of Prisons had consented to his being imprisoned in a local jail, *and he would be automatically imprisoned in the Fairfield jail if he surrendered at Sacramento.* And if special privileges were permitted by the local authorities there, such as telephones, guests, and cooking, it is obvious that Davis would have to stand the cost thereof, and that an entailed cost of $200 monthly would not be unreasonable. It

was not the understanding of Davis that this $200 monthly was to go to a United States Marshal. RT 386-387.

According to Davis, the "deal" was changed, and he was ultimately imprisoned in an Alameda County jail. This was an accredited and approved jail for federal misdemeanor prisoners, but was not used "on account of convenience". RT 457, 464. Imprisonment in many federal misdemeanor cases was in an approved jail nearest to the place of surrender, and Davis surrendered in Alameda County. RT 462. Chief Deputy Marshal Roseen said that no federal prisoners had been sent there for a long time, but he immediately referred to a federal prisoner there a "short time before". RT 457, 483. Shortly after he arrived at this Alameda County jail Davis found out that "special benefits were not available and the whole thing was ridiculous", and he instructed Church to telephone this appellant and "tell him the matter was closed". RT 321-322.

From what has just been said it is plain, of course, that Davis had a side arrangement of some sort with this appellant which, whether called "deal" or "conspiracy", was wholly independent of the plots or schemes, if any, directed against Davis by defendants Carrigan and Calmes. Taking the Davis testimony at par, it therefore follows that it was inadequate, as a matter of law, to support the allegations of the indictment that this appellant was party to a general conspiracy that operated continuously from January 27, 1951, to April 12, 1951.

Moreover, and as pointed out at page 28 of the opening brief, the case against appellant cannot survive an application of the general rule that in conspiracy cases the *corpus delicti* cannot be proved by the admissions or declarations of a defendant. In support of that rule the cases of *Colt v. United States,* 5 Cir. 160 F. 2d 650, 651, *Tabor v. United States,* 4 Cir. 152 F. 2d 254, 257, *United States v. Di Orio,* 3 Cir. 150 F. 2d 938, 940, and *Ryan v. United States,* 8 Cir. 99 F. 2d 864, 869, were there cited. Those cases and the rule they reflect passed unchallenged in the brief for appellee. Appellant adds and quotes from *Tingle v. United States,* 8 Cir. 1930, 38 F. 2d 573, 575:

> "But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or aggreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained. This statement requires no citation of authorities. It is equally true that 'extrajudicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti.' *Martin v. United States,* (C.C.A.) 264 F. 950. * * * Knowledge without some evidence of participation is not enough. Circumstances merely arousing suspicion of guilt are insufficient. * * * In such cases, when the circumstances relied upon are as consistent with innocence as with guilt, they are robbed of all probative value."

It is true that the record discloses that there were meetings between Neider and appellant, Davis and appellant, and Church and appellant. The meetings between Neider and appellant need not be reviewed here. By judgment of acquittal at the end of the government's case the trial judge declared and later instructed the jury that Neider was not a conspirator. The testimony of Neider, given as a witness for appellant, showed the innocent character of their meetings and exonderated appellant from any wrongdoing. Of the meetings between Davis and appellant, and Church and appellant, it is appropriate to say in the language of the Supreme Court in *United States v. Di Re,* 332 U.S. 581, 594, 68 S.Ct. 222, 227, that "Presumptions of guilt are not lightly to be indulged from mere meetings", and that a conspiracy charge cannot be made out by piling inferences on inferences. (*Direct Sales Co. v. United States,* 319 U.S. 703, 63 S.Ct. 1265; *United States v. Falcone,* 311 U.S. 205, 61 S.Ct. 204.)

The record here is devoid of substantial independent evidence of the corpus delicti corroborative of the declarations and admissions ascribed to appellant by Davis and Church. Therefore, under the rule just stated, the conviction of appellant for conspiracy cannot be sustained.

The appellee concedes at page 24 of its brief that the general conspiracy alleged in the indictment as continuing until April 12, 1951, ended on March 26, 1951, so far as Davis and Church were concerned. On that date Davis ceased to be the victim of a conspiracy and became the bait to entrap defendants Carrigan and

Calmes. That date also marked the ending of any side arrangement between Davis and this appellant on behalf of Davis. And if it be assumed, which appellant denies, that appellant was party to any conspiracy, the record will not permit it to be doubted that March 26, 1951, also marked the ending thereof so far as appellant was concerned.

It is apparently the position of appellee, however, that by joining a conspiracy one becomes liable for all that has gone before or may come later. The position is too broad. Cases earlier cited reflect the qualifying rule as to what has gone before. And the rule is well established that if one abandons a conspiracy or withdraws from it he is absolved from liability for what may come later. (*Hyde v. United States,* 225 U.S. 347, 32 S.Ct. 793, 803; *Local 167 v. United States,* 291 U.S. 297, 54 S.Ct. 396, 398; *United States v. Graham,* 2 Cir. 1939, 102 F. 2d 436, 444; *United States v. Anderson,* 7 Cir. 1939, 101 F. 2d 325, 331; *Marino v. United States,* 9 Cir. 1937, 91 F. 2d 691, 696.)

This case is clearly governed by the cases of *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557, and *Canella v. United States,* 9 Cir., 157 F. 2d 470, cited at page 34 of the opening brief. Defendant Reynolds was convicted of the general conspiracy alleged in the indictment as continuing from January 27, 1951, to April 12, 1951. If a conspiracy existed on or before January 27, 1951, defendant Reynolds did not join it. If it continued thereafter, defendant Reynolds did not join it. If a conspiracy existed on March 26, 1951, defendant Reynolds did not

join it. If it continued thereafter, defendant Reynolds did not join it. If any side arrangement or "deal" between Davis and defendant Reynolds reflected a conspiracy, the other defendants did not join it and it ended on March 26, 1951. Clearly, the judgment against this appellant should be reversed for the reason that it is not supported by substantial evidence.

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2. THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT ERRONEOUS INSTRUCTIONS OPERATED TO HIS PREJUDICE.

In this reply brief it is enough to cite *Kotteakos v. United States,* 328 U.S. 750, 767-771, 66 S.Ct. 1239, 1248-1251, 90 L.Ed. 1557, which discusses the prejudice which must inevitably result when jury instructions addressed to a single, continuing conspiracy are given in a case where the evidence discloses several different conspiracies.

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3. THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT DENIAL OF HIS MOTION FOR NEW TRIAL WAS A MANIFEST ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT.

No occasion exists for supplementing what was said in the opening brief at pages 39 and 40.

CONCLUSION.

Appellant therefore again respectfully submits that the judgment against him should be reversed.

Dated, San Francisco,
May 28, 1952.

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